6 that plaintiff is entitled to recover any taxes that have been overpaid by the erroneous inclusion as a dividend, the amount of $36,750.00 instead of reporting $7,411.42 which represents profits from the sale of said stock and that this suit is timely filed under the provisions of the "Revenue Act of 1932" (Chap. 209, 47 Stat. 169), Section 3226 Revised Statutes, as amended and further amended by Section 1103, Revenue Act of 1932.

XII

That the action of the Commissioner in refusing to refund the admitted overpayment as aforesaid and rejecting plaintiff's claim as aforesaid was erroneous, wrongful and illegal and that by refusing to refund such admitted overpayment the Commissioner will ultimately subject the plaintiff to a further tax on such $29,338.58 in that the tax base of the shares of stock now held will, in accordance with the ruling of the Commissioner set forth in paragraph VI, above, be correspondingly reduced upon sale or other disposition of such stock.

XIII

That plaintiff as executrix of the estate of Matthew Andrews, deceased, is the owner of the claim described in this petition; that there has been no assignment or transfer of said claim, or any part thereof, or of any interest therein; that the plaintiff is justly entitled to the amount herein claimed, after allowing all just credits and set-offs; that neither the plaintiff nor said Matthew Andrews, deceased, has in any way voluntarily aided or abetted or given encouragement to rebellion against the United States, and plaintiff believes the facts stated in this petition to be true.

7 Wherefore, the premises considered, the plaintiff prays judgment against the United States in the full sum of $5,552.98, together with interest thereon as provided by law, and for such further relief as the Honorable Court may find plaintiff entitled to receive.

FRED R. SEIBERT,
Attorney for Plaintiff,
352 Leader Building, Cleveland, Ohio.

[*Duly sworn to by Mabel S. Andrews; jurat omitted in printing.*]

8 *Appendix to petition*

In the Probate Court. 179232

THE STATE OF OHIO, CUYAHOGA COUNTY, *ss:*

I, Nelson J. Brewer, Judge of the Probate Court, within and for said County, in the State aforesaid, do hereby certify and make known, that on the 21st day of January, one thousand nine hundred and twenty-nine, letters Testamentary, on the estate of Matthew

Andrews, deceased, were granted unto Mabel S. Andrews and Donald S. Andrews, and the same are now in full force and effect, as to Mabel S. Andrews; said Donald S. Andrews having died.

In testimony whereof, I have set my hand and affixed the seal of said Probate Court, at Cleveland, in said County, this 4th day of December 1935.

(Signed) NELSON J. BREWER,
Probate Judge.

By (signed) H. BECKMAN,
Deputy Clerk.

PC 41. 3M. 2295–34.

9 II. *General traverse*

(Filed January 21, 1936)

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANK J. WIDEMAN,
Assistant Attorney General.

III. *Argument and submission of case*

On December 9, 1936, this case was argued and submitted on merits by Mr. Fred R. Seibert, for plaintiff, and by Mr. George W. Billings, for defendant.

10 IV. *Special findings of fact, conclusion of law, and opinion of the court by Whaley, J.*

Filed February 8, 1937

Mr. Fred R. Seibert for the plaintiff.

Mr. George W. Billings, with whom was Mr. Assistant Attorney General Robert H. Jackson, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced makes the following

Special findings of fact

1. Plaintiff is a citizen of the United States, residing at Gates Mills, Ohio, and is the duly appointed executrix of the estate of Matthew Andrews, deceased.

2. On or about March 15, 1931, plaintiff as such executrix duly filed an individual income tax return for the calendar year 1930, for the income of the estate of Matthew Andrews, deceased. The return disclosed a total tax due of $12,800.30, which was duly paid in quarterly installments, as follows:

March 15, 1931	$3,200.30
June 15, 1931	3,200.00
September 15, 1931	3,200.00
December 15, 1931	3,200.00

The gross income shown on the return included the amount of $110,891.50, representing dividends from domestic corporations. Of this amount, $36,750.00 was reported in the return as dividends received in the year 1930 from the M. A. Hanna Company.

11 3. The amount of $36,750.00, reported as dividends received from the M. A. Hanna Company, was derived from the following transaction: Plaintiff, prior to the year 1930, owned 1,500 shares of the original Seven Percent Cumulative First Preferred Stock Series "A" of The M. A. Hanna Company. As a result of a recapitalization of this company in November and December 1929, plaintiff was given the privilege of exchanging the aforesaid original stock on the basis of one share of the original stock for 1.27 shares of a new issue of $7.00 Cumulative Preferred Stock, the plan including an understanding that the fractional .27 share of the new stock could be disposed of to the underwriting firm handling the transaction, for $24.50 in cash for each fractional .27 share of the new stock. Plaintiff exercised the privilege so obtained and received thereby $36,750.00 in cash, in addition to 1,500 shares of the new stock, which amount in cash, as above stated, was reported in the income tax return as dividends received from The M. A. Hanna Company.

4. In December 1931, plaintiff was advised by the Internal Revenue Agent in Charge that the return as filed, reporting the sum of $36,750.00 as dividends was considered as correct, with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and that should subsequent information be received which would materially change the amount of tax reported, it would be necessary, under existing laws, to redetermine the tax liability.

5. On June 15, 1932, plaintiff filed with the Collector of Internal Revenue claims for refund in the amount of $420.00, on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company had been incorrectly computed. This claim for $420.00 was allowed in full, Certificate of Overassessment issued by the Commissioner of Internal Revenue September 24, 1932, and the amount sought in this claim paid with interest.

6. In a letter dated October 6, 1932, following conferences with representatives of The M. A. Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in

12 Charge, at Cleveland, Ohio, that the amounts of cash received by plaintiff and other shareholders of the Hanna Company, as above stated, represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the plaintiff and the other shareholders.

7. On or about February 2, 1933, plaintiff filed a claim for refund in the amount of $995.52. The grounds upon which refund was sought in this claim were stated in the claim as follows:

"First: Because a loss of $4,250.00 occurred in year 1930 on 320 shares of the common stock and 10 shares of the preferred stock of American Cuptor Corporation on which a valuation for purposes of the Federal estate tax was established as of January 5, 1929, in the amount of $4,250.00. American Cuptor Corporation became insolvent, and this stock became worthless in the year 1930.

"Second: Loss is claimed on 160 shares of the preferred stock of Bertha-Consumers Company on which the value for Federal estate tax purposes was established as of January 5, 1929, at $800.00. Bertha-Consumers Company became insolvent, and this stock became worthless in 1930.

"Copy of letter dated March 8, 1932, from the receivers of Bertha-Consumers Company to Mr. D. B. Heiner, collector of internal revenue, Pittsburgh, Pa., is attached hereto. Deponent reserves the right to file such additional information and evidence as may be needed to fully establish these claims in case the foregoing is not sufficient."

Consideration and action upon this claim was delayed awaiting the outcome of litigation relating to the question of worthlessness, in 1930, of the stock of the American Cuptor Corporation. Subsequently, in 1936, this claim was rejected in part and allowed in the amount of $160.00, which amount was covered by Certificate of Overassessment, on which refund was duly made to plaintiff.

8. On June 29, 1934, plaintiff filed claim for refund in the amount of $6,454.09. On the claim form itself appeared the following statement:

"This claim is filed as an amendment and amplification of claim for refund filed February 1, 1933. The right to amend claims
13 for refund prior to rejection has been upheld by the Supreme Court in the cases of Memphis Cotton Oil Co. (288 U. S. 62), Factors and Finance Co. (288 U. S. 89), Bemis Brothers Bag Co. (28 U. S. 28), George Moore Ice Cream Co. (289 U. S. 373), and in the case of Youngstown Sheet & Tube Co., decided by the Court of Claims, June 4, 1934.

"The basis of this claim is set forth in the attached statement."

The statement attached to the claim setting forth the basis thereof was as follows:

"This taxpayer erroneously included as a taxable dividend an amount of $36,750.00, received from The M. A. Hanna Company during the year 1930. This amount represents proceeds from sale of new preferred stock issued by The M. A. Hanna Company upon the reorganization of that company in 1930. On the basis of the value of $92 per share assigned on the estate tax return to the stock exchanged for the new issue in 1930, the basis of the stock sold amounted

to $29,338.50. The transaction, therefore, resulted in a profit of $7,411.50 instead of a dividend of $36,750.00.

"Giving effect to the above, together with the adjustments claimed in claim for refund filed February 1, 1933, results in a tax liability of $5,926.21 instead of $12,380.30, or an overpayment of $6,454.09, refund of which is herewith requested.

"Complete information with respect to the transaction here involved, and which can be furnished in the instant case if necessary, has been filed with and considered by the Bureau during the year 1932, at which time it was determined that the amounts received by stockholders in connection with the transaction did not constitute a taxable dividend.

"The right to furnish additional information in substantiation of this claim is respectfully reserved.

"A certified copy of letter from the probate court showing the appointment of the undersigned as executrix of the estate of Matthew Andrews, and that the appointment remains in full force and effect is attached."

The plaintiff was advised by the Commissioner, in a letter dated November 2, 1935, that while "the merits of the claim are allowable", it would be disallowed in full for the reason that "the facts in the case disclose that the claim filed in June 1934 was wholly unrelated to the claim filed on February 2, 1933, there being an independent demand based upon an entirely different issue. Therefore,

it is held that the claim was not filed within the limitations
14 prescribed by law and cannot be allowed." December 16, 1935, the Commissioner of Internal Revenue mailed to the plaintiff an official notice of rejection in full of this claim. The petition in this suit was filed December 12, 1935. The basis of this claim in so far as the merits thereof are concerned, was as follows: Plaintiff had reported the cash received from the sale of the fractional shares of new stock in the Hanna Company as a dividend. The Commissioner of Internal Revenue had ruled the transaction should be treated as a sale of the fractional shares of new stock. The value of the original stock in the hands of the plaintiff to be used as a basis in computing gain or loss on the sale had been determined to be $92.00 per share in the final determination of the estate tax on the estate of Matthew Andrews, deceased. On this basis the fractional shares of stock sold by plaintiff had, in the plaintiff's hands, a value of $29,338.56. The sale price was $36,750.00, resulting in a taxable profit of $7,411.44 instead of a dividend of $36,750.00, and effecting a reduction in plaintiff's tax liability for the year 1930 of $5,536.97.

Conclusion of law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover $5,536.97, with interest.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of five thousand five hundred thirty-six dollars and ninety-seven cents ($5,536.97), together with interest as provided by law.

Opinion

WHALEY, Judge, delivered the opinion of the court:

This is a suit to recover an admitted overpayment of income tax for 1930 wherein the Government defends on the ground that such payment can not be made for the reason that a timely claim for refund cannot be amended, after the period for filing a claim has expired, which sets up a new ground for recovery.

Plaintiff duly filed her return for 1930 and paid the tax of $12,800.30 shown due thereon in quarterly installments, the last installment being paid on December 15, 1931. During 1930 plaintiff, pursuant to a recapitalization arrangement, exchanged stock in a corporation in which she was a stockholder for new stock in the same corporation and at the same time exercised the privilege granted of disposing of fractional shares of new stock for $36,750 in cash. Plaintiff included the entire amount of cash so received in her return for 1930 as a dividend and paid her tax on that basis.

In December 1931 the revenue agent in charge for plaintiff's district advised plaintiff that her return as filed appeared to be correct but that such conclusion was subject to approval by the Commissioner and that in the event subsequent information be received which would materially change her tax it would be necessary to redetermine her tax liability.

In October 1932 following a conference with representatives of the corporation from which the so-called dividend had been received, the Commissioner advised the revenue agent in charge, who had previously indicated his approval of plaintiff's return as filed, that the cash received by its stockholders (including plaintiff) in the recapitalization transaction, heretofore referred to, represented proceeds from the sale of fractional shares of stock and that gains or losses should be computed on such sales instead of having the entire cash reported as dividends, as returned by plaintiff in her return. The result of this change in the treatment of the cash received, in so far as plaintiff was concerned, was that a taxable profit was shown of $7,411.44 instead of a taxable dividend of $36,750, and a reduction in her tax liability for 1930 of $5,536.97.

Subsequent thereto, namely, February 2, 1933, which was within the two-year period for filing claims on account of the tax paid in 1931 for 1930, plaintiff filed a claim for refund of $995.52 for 1930 and assigned as grounds therefor that certain losses (unrelated to the dividend item referred to above) had been sustained in that year for which deductions had not been claimed in her return.

After the statute had run on filing a new claim for refund, plaintiff on June 29, 1934, filed a claim for refund of $6,454.09 for 1930 and assigned as a basis therefor not only the grounds set out in the claim of February 2, 1933, but also the additional ground that refund should be allowed on account of the change in the treatment of the cash received in the recapitalization transaction heretofore
16 referred to, that is, such cash should not be taxed as a dividend but should be taxed only as profit to the extent that profit was shown from a sale of fractional shares of stock in the manner therefore determined by the Commissioner. The new claim was styled as an amendment and amplification of the claim filed February 2, 1933, which was still pending before the Commissioner. November 2, 1935, which was likewise before the claim of February 2, 1933, had been acted upon, the Commissioner advised plaintiff that while "the merits of the claim [that filed June 29, 1934] are allowable", it can not be allowed for the reason that the position of the Bureau was that the claim of February 2, 1933, based on certain grounds could not be amended, after the statute had run on filing new claims, to include items unrelated to those shown in the original claim. The new claim was finally rejected December 16, 1935, and this suit was instituted shortly prior thereto, December 12, 1935. The original claim was not finally acted upon until some time in 1936, when it was allowed in part and rejected in part, but no allowance has been made on account of the new item set up in the claim of June 29, 1934.

Our sole question is whether under the circumstances of this case the timely claim for refund, based upon certain grounds, was properly amended after the statute had run on filing a new claim, but prior to action on the original claim, so as to permit recovery on an item not included in the original claim. We are convinced that this case comes within the principle laid down in United States v. Memphis Cotton Oil Co., 288 U. S. 62; United States v. Factor and Finance, 288 U. S. 89, and Bemis Brothers Bag Company v. United States, 289 U. S. 28, wherein amendment of a claim was permitted under certain circumstances and that it is not essentially different from that presented in Youngstown Sheet & Tube Co. v. United States, 79 C. Cls. 683, certiorari denied, 293 U. S. 599, where the right to amend a refund claim was fully discussed and the cases distinguished. We adhere to the opinion therein expressed. See also Con P. Curran Printing Co. v. United States, No. J–657, decided by this court on June 1, 1936.

In this instance, not only was a timely claim for refund filed
17 on account of certain items, but also prior to the expiration of the time within which a new and independent claim could have been filed, the Commissioner had determined that adjustment should be made of the item which produced the overpayment now in controversy. After the statutory period for filing a new claim had expired, but prior to action on the original claim, plaintiff filed the

amendment to the original claim which did nothing more than advise the Commissioner that she was not only demanding the amount shown in the original claim but also that which the Commissioner had long prior thereto and within the statutory period recognized as payable to her. There was therefore no lack of notice within the statutory period that plaintiff was demanding refund on account of the items set out in the original claim and that refund was due plaintiff on account of the item later set up in the amended claim. Action on the claim required a redetermination of plaintiff's entire tax liability, which included a consideration of all items affecting such tax liability in order to determine whether there had been an overpayment of tax. Cf. Lewis v. Reynolds, 284 U. S. 281. When the Commissioner came to take final action on the original claim he had before him his own determination, made within the statutory period, that there had been an overpayment on the item here in controversy and an amendment to the claim showing a demand for such overpayment. All the equities are with the plaintiff. It would be immoral and unconscionable not to allow an amendment under these circumstances, and especially where an admitted overpayment of taxes is clearly shown and the Commissioner had knowledge of the overpayment prior to the expiration of the statutory period.

Judgment will accordingly be entered for plaintiff for $5,536.97 with interest as provided by law. It is so ordered.

WILLIAMS, Judge; LITTLETON, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

18 V. *Judgment*

At a Court of Claims held in the City of Washington on the 8th day of February, A. D. 1937, judgment was ordered to be entered, as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of five thousand five hundred thirty-six dollars and ninety-seven cents ($5,536.97), together with interest as provided by law.

19 [Clerk's certificate to foregoing transcript omitted in printing.]

(Endorsement on cover:) File No. 41,507. Court of Claims. Term No. 967. The United States, Petitioner, vs. Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed May 8, 1937. Term No. 967 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

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U. S. GOVERNMENT PRINTING OFFICE: 1937